

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

SOUTH OF MARKET CHILD CARE, INC.

Employer

and

Cases 20-RC-17789

UNITED EDUCATORS OF SAN FRANCISCO,  
LOCAL 61

Petitioner

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,<sup>1</sup> the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is a non-profit California corporation providing childcare with places of business located at 790 Folsom Street and 366 Clementina Street, in San Francisco, California. The parties further stipulated, and I find, that during the 12 month period preceding the hearing, in the course

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<sup>1</sup> After the close of the hearing, the parties entered into a written stipulation, and I find, that Board Exhibit 9, a joint stipulation, is included in the record.

and conduct of its business operations, the Employer received gross revenues valued in excess of \$250,000, and purchased and received goods and/or services valued in excess of \$5,000 which originated from points located outside the State of California. Based on the parties' stipulation to such facts, it is concluded that the Employer is engaged in commerce and it will effectuate the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The parties stipulated, and I find, that there is no collective bargaining agreement covering any of the employees in the unit sought in the petition herein.

5. The Petitioner seeks to represent a unit of employees at the Employer's two child care centers in San Francisco, California. The parties do not dispute the inclusion in an appropriate unit of the following classifications of employees working at both the 790 Folsom and 366 Clementina Street facilities of the Employer: teachers, associate teachers, assistant teachers, teacher aides, cooks, secretaries, kitchen assistants, substitute teacher, substitute assistant teacher, substitute teacher aides, and receptionists.<sup>2</sup> As discussed below, the parties have further stipulated, and I find, that the head teachers, teachers and associate teachers are professional employees and that the other listed classifications are non-professional employees.

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<sup>2</sup> The parties are in agreement, and I find, that an exempt employee named Patrice Johnson, who works in the Employer's family resource center at the Folsom facility, should not be included in the unit. The record reflects that Johnson sets up programs for families, oversees respite care programs and heads up a committee of parent and community members who are working to rebuild a neighborhood elementary school. She also coordinates a food bank program and social and recreational activities for families administered by the Employer. She also locates facilities for parent education classes. Based on the fact that she works in a separate program and is not involved in the school programs run by the Employer, she is excluded from the unit. I further note that the record shows that the Employer is in the process of hiring more employees in this program so Johnson is not a single residual employee at the Folsom facility.

The only issue presented in this case is whether the four head teachers at the Employer's infant and preschool programs at its two locations in San Francisco, California, should be excluded from the unit on the basis that they are supervisors under the Act. The Employer contends that they are supervisors and the Petitioner takes the opposite position.

The Employer has two locations, one at 790 Folsom Street, and one at 366 Clementina Street, in San Francisco. There are three head teachers (Maria Garcia, Janette Wright and Natasha Bacca) working at the Folsom facility and one head teacher (Teresa Fontanello) working at the Clementina facility. There is also a site supervisor in charge at each facility. At the Folsom facility, this is Helen Blain and at the Clementina facility, the site supervisor is Nkechi Nkwonko.<sup>3</sup> The Employer's Executive Director Judith Baker also oversees both facilities.

The Folsom facility has six classrooms. In addition to the site supervisor and the head teacher, the staff consists of approximately ten pre-school teachers, six infant/toddler teachers, five substitute teachers, one receptionist, one administrative assistant and a cook. At the Clementina facility, there is one site supervisor, one head teacher, five teachers (including two teachers, two associate teachers and one assistant teacher), one teacher's aide and a substitute teacher's aide.

The record reflects that the head teachers have regular teaching duties in the classroom and have the same responsibilities as do other teachers during such times. They also substitute for other teachers during break times.

The record contains two job announcements for the head teacher position, one dated January 18, 2001, and the other undated, which include the following listing of

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<sup>3</sup> Nkwonko had only been the site supervisor for about one month at the time of the hearing.

duties: orienting new teaching staff into the classroom; meeting with parents and guardians about children; serving as a mentor teacher to other teachers; performing teacher responsibilities while in the classroom; serving as a site supervisor in the absence of the Executive Director and Educational Coordinator; reviewing teacher lesson plans and ensuring that all documentation is up to date; setting up and chairing regular meetings with classroom teams to develop curriculum; bringing problems regarding the smooth implementation of the program to the attention of the educational coordinator or executive director; scheduling breaks and ensuring adequate coverage. The qualifications for the position include: meeting the State requirement for Master Teacher or Site Supervisor; three units of administration or two units of staff supervision; and prior supervisory experience. The infant/toddler head teacher must also have three to six units of infant care and development.

The Head Teachers' Role in Hiring. The site supervisor is responsible for final hiring decisions. The record shows that the site supervisor sometimes asks the head teachers to interview teachers and teacher's aides.<sup>4</sup> Site Supervisor Blain testified that she usually places prospective teachers and teachers aides in the classroom and has the head teachers observe them at work and then the head teachers recommend whether the person should be hired. Blain testified that there has never been a time when she has hired someone that a head teacher objected to or not hired someone that a head teacher

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<sup>4</sup> Head Teacher Maria Garcia testified that in the three years that she has worked for the Employer, there was only one occasion when she was asked to interview an applicant for an assistant teacher position. According to Garcia, on that occasion the applicant spoke only Spanish and the site supervisor did not speak Spanish. She testified that she interviewed the applicant with no one else present and reported what she learned to the site supervisor and/or director who made the final decision. The record does not disclose whether she made a recommendation for or against hiring this applicant or whether it was followed.

recommended after making such observations. She testified that their recommendations are effective in hiring.

Role in Evaluations. The head teachers prepare written evaluations on the other teachers twice a year. In these evaluations, they discuss the teacher's strengths and weaknesses. The evaluation uses established criteria but does include a comments section wherein the head teacher can comment on the employee's strengths and weaknesses. The head teachers may seek the advice of the site supervisor prior to writing up this evaluation but it is their decision whether to do so. After writing up the evaluation, the head teacher meets with the employee being evaluated to go over the evaluation and to come up with goals for the next period. Head Teacher Maria Garcia testified that she had evaluated four teachers in the year prior to the hearing and that she had never changed an evaluation based on her meeting with the employee. Once the goals have been written, the employee signs the evaluation and the head teacher provides the employee with a copy of it and gives a copy to the site supervisor and/or executive director who place it in the employee's personnel file. The site supervisor generally does not get involved in the evaluation process unless the head teacher chooses to consult with her or if the employee and the head teacher do not agree on the evaluation and/or goals. On such occasions, the site supervisor makes her own observations of the employee and makes a final decision on how to proceed. In this regard, Site Supervisor Blain testified that there had recently been a dispute between a head teacher and an employee whom the head teacher had evaluated, and she (Blain) had observed the employee and had agreed with the head teacher's position in the matter. Blain testified that she had thereupon helped prioritize the goals that had been written by the head teacher for the employee.

Pre-School Teacher Ofelia Aguil, who works at the Clementina facility, testified that she had received evaluations from the head teacher at that facility and that the site supervisor had not been involved in the evaluation process. According to Aguil, the head teacher had written in the evaluation that an area for her to address was that her voice was too loud in the classroom; that she had worked to improve in this area as one of her goals; that the head teacher had subsequently orally commented that she was improving in this area; and that the problem was not mentioned in her next evaluation.

Even when employees have no problems to address in their evaluation, the head teacher and the employee come up with goals for their development and improvement, including such goals as obtaining child center permits and taking appropriate classes (for example, in English). The site supervisor then provides the employee with the tools (permit applications and schedules for classes) to enable the employee to work on his or her goals.

Role in Disciplining Employees. The head teacher keeps her own written records/assessments of problems that she observes regarding teachers. She orally counsels the teachers about areas that they need to improve upon. Site Supervisor Blain testified that she and the head teacher had signed written warnings given to employees, although the record contains no documentation in this regard.

Blain testified that the head teachers have independent authority to give oral and written plans of action for employees which are basically probationary periods during which an employee must improve his or her conduct in an area or face further discipline.

At the time of the hearing, one employee was on a three-month probation/plan of action to improve conduct discussed in an evaluation of the employee by the head

teacher. Although the record does not disclose the nature of this employee's problems, it does show that the site supervisor and the head teacher jointly decided on the probation/plan of action and that the head teacher was the person designated to implement the plan of action and to report back to the site supervisor as to whether the employee had passed the probation or not. The final decision regarding what would happen to the employee is made by the site supervisor based on the recommendation of the head teacher regarding how the employee did on the plan of action. The decision as to the employee involved in this plan of action was due in mid-October 2002, and termination was being considered. Blain testified that if a serious disciplinary action such as loss of pay or termination of an employee is involved, the head teacher cannot take such actions independently and that the site supervisor must be involved in the decision-making. The record contains no evidence regarding any terminations, suspensions or other disciplinary action beyond the evidence regarding the employee who was on probation at the time of the hearing. Head Teacher Garcia testified that other than this current probation situation that she was involved in, she had never done a plan of action for any employee in the three years that she had been a head teacher. However, she testified that although the site supervisor had never specifically informed her that she had authority to write up a plan of action for an employee, she believed that she had such authority because she was the person who implemented the plan and reported whether the employee had fulfilled it.

Timekeeping, Time Off, Scheduling. Employees at the Employer's childcare centers sign time sheets and the Employer's administrative assistant oversees the timekeeping functions. If there are discrepancies in an employee's timesheet, the

administrative assistant and financial manager handle them and not the head teachers. If employees are going to be late or absent from work, they notify the head teacher who in turn notifies the site supervisor who is responsible for obtaining a substitute. Teacher Ofelia Aguil testified that when she needs to leave work early, she asks her head teacher and then she leaves. Otherwise, there is no evidence that the head teachers are involved in the scheduling of employees for work or for vacations.

Transfers, Layoffs and Assignment of Work. There is no evidence of temporary or permanent transfers between the two facilities. Nor is there any evidence of layoffs or recalls of employees. With regard to work assignments, the head teachers can direct teachers to work in a different classroom at the same facility to fill in for a teacher on break. If a permanent transfer to another classroom were being considered, the head teacher makes a recommendation and the executive director, site supervisor and head teacher jointly decide whether to transfer the employee. With regard to direction of work, Teacher Aguil testified that the teachers must follow the directions of the head teachers and she knew of no instances where a teacher had failed to do what a head teacher asked her to do.

Wages and Benefits. The Employer's wage scale for teachers is determined by the educational level and certifications/permits that a teacher possesses. There is no evidence that the teachers' evaluations have affected their wages unless it results in their termination or other further disciplinary action. The head teachers earn about \$2 more an hour than the teachers. The site supervisor earns about \$2 to \$3 more an hour than do the head teachers. The benefits given to the head teachers are the same as those given to the other teachers.



Meetings Attended by Head Teachers. The head teachers meet with the site supervisor every other week to discuss programs and upcoming events. Personnel matters are not addressed in these meetings. Personnel matters are discussed in weekly meetings attended by the site supervisor, executive director and mental health consultants. The head teachers do not attend these meetings.

Applicable Legal Principles. Section 2(11) of the Act defines the term supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.” The possession of any one of the indicia listed in Section 2(11) is sufficient to confer supervisory status on an employee if that authority is exercised on behalf of management with independent judgment and not in a routine manner. *Commercial Fleet Wash*, 190 NLRB 326 (1971); *Indiana Refrigerator Lines*, 157 NLRB 539, 550 (1966).

To support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set forth in Section 2(11) of the Act. Further, such authority will be deemed supervisory under Section 2(11) only if it is exercised with independent judgment on behalf of the employer and not in a routine manner. *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). An individual who exercises some “supervisory authority” only in a routine, clerical, perfunctory, or sporadic manner will not be found to be a supervisor. *Id.* In determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because

the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. Hydro Conduit Corp., 254 NLRB 433, 447 (1981). The burden of proving that an individual is a supervisor rests on the party alleging such status. Tucson Gas & Electric Company, 241 NLRB 181 (1979). Secondary indicia alone, such as differences in pay, are insufficient to establish that an individual is a statutory supervisor. Waterbed World, 286 NLRB 425, 426 (1987).

In the instant case, based on the evidence in the record, and particularly on the evidence that the head teachers make effective hiring recommendations and also on their involvement in handling employee evaluations and jointly creating plans of action with the site supervisor and implementing such plans of action that can result in further discipline, including the termination of employees, I find that the head teachers are statutory supervisors and they are excluded from the unit. Detroit College of Business, 296 NLRB 318, 319-320 (1989).

As indicated above, the parties stipulated that the teachers and associate teachers are professional employees under the Act and that the assistant teachers, teachers aides, cooks, secretaries, kitchen assistants, substitute teachers aides and receptionists are non-professional employees. Accordingly, I shall direct a Sonotone<sup>5</sup> election in the following voting groups :

#### VOTING GROUP A

All full-time and regular part-time professional employees, including teachers and associate teachers, employed by the Employer in its facilities located at 790 Folsom Street and 366 Clementina Street, San Francisco, California; excluding all confidential employees, managerial employees, guards and supervisors as defined in the Act.

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<sup>5</sup> See Sonotone Corporation, 90 NLRB 1236 (1950).

### VOTING GROUP B

All full-time and regular part-time non-professional employees, including assistant teachers, teachers aides, cooks, secretaries, kitchen assistants, substitute assistant teachers, substitute teacher aides and receptionists, employed by the Employer in its facilities located at 790 Folsom Street and 366 Clementina Street, San Francisco, California; excluding all confidential employees, managerial employees, guards and supervisors as defined in the Act.

The employees in the professional voting Group A will be asked two questions on their ballots:

1. Do you desire to be included in the same unit as other employees employed by the Employer at its San Francisco, California facilities for the purpose of collective bargaining?
2. Do you desire to be represented for purposes of collective bargaining by United Educators of San Francisco, Local 61?

If a majority of the professional employees in Voting Group A vote yes to the first question, indicating a desire to be included in a unit with the non-professional employees, they will be so included. Their vote on the second question will then be counted with the votes of the non-professional employees voting in Voting Group B to decide whether to select Petitioner as the representative for the entire combined unit. There is no indication in the record that the Petitioner would be unwilling to represent the professional employees separately if those employees vote for separate representation. Thus, if the professional employees in Voting Group A do not vote for inclusion they will constitute a separate unit. However, if the Petitioner does not desire to represent the professional employees in a separate unit, even if those employees vote for such

representation, the Petitioner may notify the Regional Director to that effect within 10 days of the date of the Decision and Direction of Elections.

The ultimate determination will be based on the results of the elections. However, the following findings are made with regard to the appropriate units:

1. If the professional employees vote for inclusion in a unit with the non-professional employees, it is found that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time professional and non-professional employees, including teachers and associate teachers, assistant teachers, teacher aides, cooks, secretaries, kitchen assistants, substitute assistant teachers, substitute teacher aides and receptionists employed by the Employer in its facilities located at 790 Folsom Street and 366 Clementina Street, San Francisco, California; excluding all confidential employees, managerial employees, guards and supervisors as defined in the Act.

2. If the professional employees vote against inclusion in the unit with the non-professional employees, it is found that the following units are appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

#### UNIT A

All full-time and regular part-time professional employees, including teachers and associate teachers, employed by the Employer in its facilities located at 790 Folsom Street and 366 Clementina Street, San Francisco, California; excluding all confidential employees, managerial employees, guards and supervisors as defined in the Act.

#### UNIT B

All full-time and regular part-time non-professional employees, including assistant teachers, teachers aides, cooks, secretaries, kitchen assistants, substitute assistant teachers, substitute teacher aides and receptionists, employed by the Employer in its facilities located at 790 Folsom Street and 366 Clementina Street, San Francisco, California;

excluding all confidential employees, managerial employees, guards and supervisors as defined in the Act.

#### DIRECTION OF ELECTION

Elections by secret ballot shall be conducted by the undersigned among the employees in the voting groups set forth above at the time and place set forth in the notice of elections to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in each voting group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the UNITED EDUCATORS OF SAN FRANCISCO, LOCAL 61.

#### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election

should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director of Region 20 who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Region 20 Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before October 24, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by October 31, 2002.

**DATED** at San Francisco, California, this 17<sup>th</sup> day of October, 2002.

/s/ Robert H. Miller  
Robert H. Miller, Regional Director  
National Labor Relations Board  
Region 20  
901 Market Street, Suite 400  
San Francisco, CA 94103-1735

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